Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1994

D-LANDCO, an Oklahoma Corporation;
and **BARBARA LASH**
Petitioner,

vs.

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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68 pp

QUESTIONS PRESENTED

(1) Did Petitioner receive just compensation under Amendment V to the United States Constitution after state and local officials, working together, placed Petitioner's property in a freeze by restricting its use, reserving the land for a planned expressway and substantially depressing the value to low agricultural prices?

(2) Did Petitioner receive just compensation under Amendment V to the United States Constitution if Petitioner did not receive compensation reflecting the "highest and best" use (to-wit: commercial) of its land in the condemnation proceeding?

(3) Did Petitioner receive substantive due process under the same facts?

(4) Does the violation of the rule of sequestration by an important government appraisal witness, Mrs. Janice K. Gordon, infringe upon Petitioner's right to obtain just compensation under Amendment V and the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

The parties before this Court are the Petitioner, D-LANDCO, Inc., an Oklahoma Corporation which is the owner of the land in this condemnation action and Barbara Lash, a former tenant of a home on the property (no longer an interested party). Respondent is the OKLAHOMA DEPARTMENT OF TRANSPORTATION (sometimes called ODOT) with principal offices in Oklahoma City, Oklahoma.

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STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner D-LANDCO, an Oklahoma corporation, respectfully prays that a writ of certiorari issue to review the Opinion of the Oklahoma Court of Appeals, Division III, dated Decemer 28, 1993 and the Order of the Oklahoma Supreme Court dated April 19, 1994 rejecting Petitioner's request for review thereof.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Appeals, Division III dated December 28, 1993 is unreported. It is reproduced in the appendix hereto, A-2–A-5.

The Order of the Supreme Court of Oklahoma dated April 19, 1994 denying Petitioner's request for Writ of Certiorari to the Court of Appeals of the State of Oklahoma, Division III is reproduced in the appendix hereto, A-1.

The Judgment of the Tulsa, Oklahoma District Court dated April 1, 1992 which was entered upon jury verdict of the same date, is reproduced in the appendix hereto A-21–A-23.

JURISDICTION

This Petition for Writ of Certiorari seeks a review of the final order of the Oklahoma Supreme Court, a court of last resort, denying discretionary review of a decision rendered by the Oklahoma Court of Appeals, Division III affirming a jury verdict rendered in an Oklahoma trial court. Petitioner invokes the jurisdiction of this Court pursuant to *28 U.S.C. § 1257 (a)*.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are:

(1) *"Fourteenth Amendment Section 1, United States Constitution*. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.*" (Emphasis added).

(2) *"Fifth Amendment, United States Constitution.* No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added).

(3) *"Article II, Section 24, Oklahoma Constitution. Private property shall not be taken or damaged for public use without just compensation.*" (The complete contents of the constitutional provision are reproduced in the Appendix A-39.) (Emphasis added).

(4) *Oklahoma Statute, Exclusion of Witnesses, Title 12, Oklahoma Statutes, Sec. 6155.* (The complete statute is reproduced on page 17-18 and Appendix A-38.)

STATEMENT OF THE CASE

This is a condemnation action. The case was filed by Respondent State of Oklahoma, ex rel., Department of Transportation ("ODOT") to condemn 28 acres of land and a single family home in Tulsa owned by Petitioner, D-

LANDCO, for the Mingo Valley Expressway which runs throughout the eastern part of Tulsa, Oklahoma. This is a federally-financed highway.

The 28 acres were a part of a larger tract of land owned by the Petitioner. The larger tract consisted, before the taking, of 139 acres. The 139 acres are bordered by 81st Street on the North and by Garnett Road on the East in the City of Tulsa. The condemned 28 acres are situated along Mingo Road between 81st Street and 91st Street.

At the time of trial (1992) the 28 acres was zoned for agricultural use (AG) and the balance of the property, 111 acres, had been rezoned in 1985 for commercial/industrial purposes (CO). This classification has 161 commercial, industrial and other uses permitted under local zoning laws.

This action was filed in 1990. Commissioners were appointed and a report assessing damages resulting from the condemnation at $1,200,000.00 was returned by them. Both parties filed demand for Jury trial. Trial occurred on March 9 to 12, 1992 and nine (9) members of a Tulsa, Oklahoma jury returned a verdict of $708,220.00 as the amount of damages suffered by Petitioner. The jury verdict and judgment rendered thereon was appealed to the Oklahoma Supreme Court and affirmed.

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to issue its Writ of Certiorari for these reasons:

1. This is a case of first impression. Petitioner's research does not indicate any prior decisions of this Court,

any federal court or any state court, in which the zoning powers of a municipality have been used to depresss land values in an eminent domain proceeding and later shown to actually have this effect. In this context the just compensation clause of the Fifth Amendment seems compromised, violated and rendered meaningless.

2. Petitioner was denied due process and equal protection in violation of both the *Constitution of the State of Oklahoma and the Constitution of the United States* when the Tulsa Metropolitan Area Planning Commission (TMAPC) and City Council, working in conjunction with and at the request of Respondent "reserved" Petitioner's property for agricultural purposes in anticipation of the future condemnation of an expressway. This action resulted in "freezing" Petitioner's property and depressing its true value at the time of condemnation. Such was the intended purpose of this "freezing" action by public officials.

3. The $708,220.00 does not reflect the value of the "highest and best use" of Petitioner's property *without government interference* in a "free and open marketplace."

4. Mrs. Jan Gordon, witness for Respondent, violated the rule of sequestration through Respondent's intermediary, *her husband*, who committed error prejudicial to Petitioner by revealing to Mrs. Gordon testimony of Petitioner's expert witnesses.

5. Petitioner did not receive just compensation which is mandated by the *Oklahoma Constitution, Art. II, Sec. 24* and the *United States Constitution, Amendment V.*

6. The Oklahoma Court of Appeals and the Oklahoma Supreme Court seemed to treat this as a zoning case. (No appeal was taken by Petitioner from adverse zoning actions.) This is not a zoning case. Zoning was a tool used by Respondent to depress the value of Petitioner's property.

PROPOSITION I

Petitioner failed to receive just compensation after state and local officials, working together, placed petitioner's property in a freeze by restricting its use through zoning laws, reserving its land for a planned expressway and substantially depressed the land's value to low agricultural prices. This also constituted deprivation of constitutional guarantees of due process and equal protection of laws.

I.
FACTS

CO (commercial/corridor/industrial) zoning was rejected by the Tulsa Metropolitan Area Planning Commission (TMAPC) and the Tulsa City Commission in order to give Respondent an opportunity to later purchase this property for the planned Mingo Valley Expressway at "low" agricultural land prices.

Petitioner believes it was denied a fair trial because of the refusal of the Tulsa City Commission, at the request and urging of Respondent, to depress land prices by rejecting

rezoning of the 28 acres. This constituted a confiscation of Petitioner's property without due process of law and was prejudicial to its constitutional rights in this condemnation action.

The opinion of the Court of Appeals contains an erroneous statement of material fact.

While recognizing that Petitioner "attempted to show that the value of the 28 acre tract of land in question was adversely effected by the failure of the TMAPC to upgrade the zoning of the land," the Court refused to recognize Petitioner's adversity resulted from the specific actions of Respondent. This is clearly shown by written documents admitted into evidence. These documents are letters from Respondent to the TMAPC intended to reserve Petitioner's 28 acres along the Mingo Valley Expressway for future roadway acquisition.

TMAPC and the City Council adopted the following staff recommendation:

> "The staff can support CO zoning on the subject tract *less and except that portion located in the proposed Mingo Valley Freeway which is to remain AG.*" (Trial Transcript pgs. 88, 89, Emphasis added by underscoring.) A-30, A-31.

The Court of Appeals opinion, further, erroneously states that the "landowner neither contested the action of the TMAPC (refusal to re-zone) nor sought another zoning classification for the 28 acres." This is not accurate. Petitioner believes this misstatement serves as a precursor of the Court's decision. In fact, Petitioner asked the TMAPC to re-zone the

28 acres for commercial purposes (CO) in Petitioner's original 1985 zoning application.

The fact is Petitioner's 28 acres, which were targeted to be condemned by Respondent, were frozen at a lower value than economically realistic in order to keep the purchase price thereof artificially low since it was located in the proposed Mingo Valley Expressway and for that reason was to remain AG.

Wayne Alberty, City Planner and former TMAPC official, testified for Petitioner. Wayne Alberty testified as follows:

> Q Why wasn't the entire 139 acres placed in a CO zoning district as D-LANDCO requested? If you know?
>
> A By policy of the staff to recommend exclusion of the portions that is within a proposed right-of-way take.
>
> Q And what's the purpose of that recommendation of the staff?
>
> A I think it is a clear cut purpose to attempt to hold down the values of the property.
>
> Q And that's what happened to the 28 acres of D-LANDCO property, isn't it?
>
> A Yes, that is correct.
>
> (Trial Transcript pg. 90.) A-30–A-32.

Another witness, Robert L. Parmele, Jr., who was the chairman of TMAPC testified about Petitioner's application to re-zone and what happened to it:

A The application was for corridor zoning CO *on the entire tract*. As I recall the staff recommendation was for approval of CO zoning on the tract except for the 28 acres, I believe that was reserved for future right-of-way of the Mingo Valley Expressway.

Q Is there a policy of reserving future expressway for the Mingo Valley Expressway and not rezoning it? At the staff level?

A I think at the staff level the policy is not to recommend approval of rezoning of future expressway right-of-way.

Q And why does the staff have that policy? If you know?

A My opinion is that they feel by reserving that right-off-way it changes the value of the property.

Q Up or down, Sir?

A Downward.

(Trial Transcript pg 191.) A-33.

II.
JUST COMPENSATION

Just compensation for property is defined as compensation for land at its highest and best use. This is the criterion for determining its fair market value and it is the function of due process to obtain the highest and best value for the landowner.

The retention of Petitioner's 28 acres in AG was a governmental action that constituted an unfair and unreasonable impact on Petitioner and was, in effect, a confiscation of its 28 acres at the lowest possible value. As noted in the commentary appearing in *9 ALR3rd 291, 304, 305*:

> "Many courts have vigorously condemned as confiscatory the action of a public body in adopting a petition for rezoning merely for the purpose of decreasing land value or preventing its proper utilization, in order to lower acquisition costs in eminent domain proceedings."

Consideration of the compensation question, Petitioner believes, begins with reference to the language of the Fifth Amendment, which provides in relevant part that private property shall not be taken for public use without just compensation. As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of the power. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981), *Hurley v. Kincaid*, 285 U.S. 95, 76 L.Ed. 637, 52 S.Ct. 267 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); and *United States v. Jones*, 109 U.S. 513, 518 (1883).

This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure

JUST COMPENSATION in the event of otherwise proper interference amounting to a taking. Government action that works a taking of property rights necessitates the constitutional obligation to pay meaningful *and* just compensation. *Armstrong v. United States*, 364 U.S. 40, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960). Condemnation of private lands for federally-financed highways is a common example of the use of the Fifth Amendment.

III.
WHAT HAS PETITIONER LOST?

It is familiar law that the usual, but not exclusive,[1] measure of "just compensation" in condemnation actions is fair market value; i.e., the highest amount of money that would be paid for the property in question by a willing but unpressured, informed buyer, to a willing but unpressured,

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1 In *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1086, 93 L.Ed. 1392 (1949), the Supreme Court pointed out although market value is the usual measure of just compensation, the courts have refused to make "a fetish" out of it because in some situations it may not be an appropriate measure of damages. For examples of the application of nonmarket value damages, see *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951), *Port Authority etc. v. Hudson Rapid Tubes*, 231 N.E.2d 737 (N.Y. 1967). Market value is the proper measure of compensation where the property being valued is of a kind often bought and sold in the market, so that one is justified in concluding that the haggling of the market is likely to produce a price that a reasonable landowner would accept, were he to act as a seller. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949).

informed seller.[2] The question then becomes: *"What has the owner lost?"* [3]

The fundamental premise underlying valuation law is this inquiry. Thus, in fixing just compensation in a condemnation case, one should look to the harm inflicted on the aggrieved owner.

Petitioner, in this case, has lost the fair market value of its land. The trial court should have taken action to address the wrong of tainting the eminent domain proceedings over which he was presiding. An instruction to disregard farmland prices is a remedial possibility.

IV.
DUE PROCESS

Universally, zoning actions intended by local officials to depress the value of land in anticipation of condemnation have been ruled invalid. Such actions violate constitutional prohibitions against deprivation of private property without due process of law and against the taking of private property for public use without just compensation. These type of freezing laws have been held to be arbitrary, unreasonable and confiscatory. See *Robertson v. Salem*, 191 F.Supp 604 (1961,

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2 This classic formulation of the rule may be found in the widely followed decision of the California Supreme Court in *Sacramento & S.R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909).

3 See *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 305 S.Ct. 459, 54 L.Ed. 725 (1910).

DC Oregon); *Symonds v. Bucklin*, 197 F.Supp 682 (1961 DC Md); *Urbanizadora Versalles, Inc. v. Miguel A. Rivera Rios et al*, 701 F.2d 993 (1993, USCA, 1st Cir.).

Official map cases are a classic example. These reserve future right-of-ways for expressways and other public improvements and sometimes provide that use of lands in the path of future construction work will be reserved for condemnation. This was the type of conduct seen in the subject case in Tulsa by Petitioner and which was, after extensive examination, stricken as invalid in *Urbanizadora*, supra, by Circuit Judge Levin H. Campbell who, in discussing a Puerto Rico freezing statute said: "It is well settled that the zoning authority cannot be used to depress the value of land so as to reduce the expense of a subsequent condemnation." *Peacock v. City of Sacramento*, 271 Cal.App.2d 845, 77 Cal. Rptr. 391 (1969).

Similar rulings can be found in civil rights litigation. See, for example, *Oberndorf v. City and County of Denver*, 653 F.Supp 304 (USDC, Colorado, 1987) where an injunction was issued to prevent the taking of neighborhood properties supposedly blighted by an urban renewal agency.

Zoning actions by public officials should not be used as a tool to take property for public use without payment of compensation. A case in point is *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. 1958). A California municipality refused to re-zone 12 lots in anticipation of future condemnation for airport expansion. The lots, which were worth $114,000.00 if re-zoned for apartments, had a value of only $48,000.00 when re-zoned for homes by the planning

commission. The rezoning was invalidated by the California Supreme court with this pronouncement:

> "The evidence establishes that to accomplish the enlargement of the airport and the creation of the approach zone the city intends to condemn the subject property. The inference is clear that the purpose of the ordinances was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes."

Other decisions in accord are *State ex. rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317; *and Grand Western R.C. v. City of Detroit*, 326 Mich. 387, 40 N.W.2d 195.

PROPOSITION II

Permitting respondent's expert Mrs. Janice K. Gordon to testify deprived petitioner of due process and equal protection of the laws.

Petitioner also believes the trial court erred in permitting Respondent's Janice K. Gordon to testify-violating the rule of sequestration existing in Oklahoma.

The Oklahoma Court of Appeals suggests the "landowner objected because Gordon's husband had been in the courtroom throughout the trial." This is not correct. Petitioner objected because Gordon's husband actively discussed the case with Mrs. Gordon prior to the time Mrs. Gordon testified and he gave her important information about the testimony of other witnesses including that of Wayne Alberty, City Planner.

Mrs. Gordon became a witness for Respondent, in part, to rebut the testimony of Mr. Alberty. Mrs. Gordon admitted that she and her husband had discussed the testimony of Petitioner's witness Wayne Alberty.

Q All right, your husband is named David Gordon. Is that correct?

A Yes, sir.

Q Has David Gordon been in attendance at these trial proceedings the last three days, according to your knowledge?

A Yes, sir.

Q An how do you happen to know that?

A He called and told me that he was here and told me that's why he was going.

Q All right. How many times has your husband talked to you in the last three days about where he has been?

A I don't know that I could say a number. I don't know.

Q More than once?

A Yes.

Q All right. Has he told you that he has been in this particular trial, observing the trial proceedings, more than one?

A Yes.

Q All right. More than twice maybe?

A Well, I guess if he's been here three days.

Q Okay. He stays in contact with you rather regularly, I assume?

A Probably twice a day.

Q All right. And you stay in touch with him likewise?

A When he calls. I can't call him.

(Trial Transcript pg. 523, 524.) A-34–A-35.

Mrs. Gordon admitted she and her husband had discussed the testimony of Petitioner's witness Wayne Alberty:

Q Okay. And what did that [Mr. Alberty's plan for commercial development of landowners' 28 acres] mean to you?

A I had looked at that to see if there was anything to equate it in the marketplace.

Q And that's really the reason you had been hired in this case, to make that kind of determination, isn't that right?

A To determine the land use of the property, yes, sir.

Q And, specifically, to determine whether Mr. Alberty's plan is feasible in the marketplace.

A I don't think that's quite a true statement because...

Q Is it partially true?

A Well, I will put it this way. My assignment was to look at the land uses before I ever knew of Mr. Alberty or his plan.

Q But at some point you did know about Mr. Alberty's plan, didn't you?

A Yes, sir.

Q And it was specifically given to you for determination of the question of whether Mr. Alberty's plan was feasible in the current marketplace. Isn't that right?

A Yes, sir.

(Trial Transcript pg. 531.) A-35–A-36.

The trial court impermissibly allowed the violation of the rule of sequestration because permitting a witness to testify when the rule has been invoked and later broken, directly or through an intermediary, violates the rule.

The so-called rule of sequestration, or exclusion of witnesses, had been a tradition of the law in Oklahoma long before it was made a matter of statute in 1978, *12 O.S. 2615*.

Traditionally, the Supreme Court of Oklahoma has held that the enforcement of the rule was discretionary with the trial court and that the trial court's failure to enforce the rule or to permit it to be violated, once it was invoked, would not be disturbed on appeal unless the trial court abused its discretion.

The codified law enacted in 1978 and amended in 1988 reads as follows:

12 O.S. 6155. **Exclusion of Witnesses**

"At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order or its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person;

2. An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

3. The victim of an alleged criminal offense or a representative of said victim, in any criminal prosecution, upon the motion of the state to bar such exclusion, unless the court finds such exclusion to be in the interest of justice." (Emphasis added by underscoring.)

Petitioner submits that the word "shall" in "the court shall order witnesses excluded" takes away the discretion the trial court had before the statute was enacted, except with respect to the three enumerated exceptions, none of which was present in this case.

Indeed, "shall" connotes a mandatory duty.

Petitioner submits that, in light of the codification of the rule of sequestration, which codification requires that "the court shall order witnesses excluded," the trial court did not have the discretion to ignore the rule. Petitioner respectfully urges the trial court should not have permitted Mrs. Gordon to testify, a violation of substantive due process.

The witness Jan Gordon was an important witness for Respondent in this action. She testified that Wayne Alberty, Petitioner's witness on the issue of highest and best use, was wrong when he concluded that commercial use of the 28 acres was its most appropriate use.

She should not have been told this was Mr. Alberty's evidence by her husband the night before she took the witness

stand. The inference is clear that the purpose for which Respondent employed Mr. David Gordon was not only to assist Respondent's counsel at trial but to assist his wife in preparing her testimony.

CONSTITUTIONAL ISSUES WERE RAISED IN OKLAHOMA COURTS

Petitioner has consistently maintained that violations of due process, equal protection and Fifth Amendment guarantees, as well as other objections exist herein. Petitioner first objected to the manner that these proceedings were conducted shortly after this action was filed by written objection in the trial court. This is reproduced in the Appendix A-26–A-28. All subsequent pleadings, documents and briefs have alleged constitutional infirmity including the Petition-in-Error filed with the Oklahoma Supreme Court in 1992 A-6–A-18. The Oklahoma Court of Appeals acknowledged and specifically discussed the constitutional issues raised by Petitioner albeit rejecting Petitioner's claims in the Court's Opinion A-2–A-5. This statement is made pursuant to *Supreme Court Rule No. 14(h).*

CONCLUSION

Petitioner, D-LANDCO, has not received adequate, fair and "just compensation" for its 28 acres of urban land taken by eminent domain for the Mingo Valley Expressway by Respondent STATE OF OKLAHOMA, ex rel., DEPARTMENT OF TRANSPORTATION ("ODOT"). Certiorari should be granted in order to review the opinion of the Oklahoma Court of Appeals, Division III which rejected

this view and the decision of the Oklahoma Supreme Court to deny review thereof.

Respondent bought the property at a bargain basement price after it and the City of Tulsa rendered the property economically valueless. Petitioner believes these concerted actions were neither fair nor in accord with requirements of due process of state and federal constitutions. Nor is this an award of fair compensation.

Zoning actions by public officials should not be used to take private property for public use without payment of just compensation. When a de facto taking has occurred the depressed prices are a clear violation of constitutional principles.

Petitioner believes a new trial to redress these wrongs should be granted in this case and its Petition for Certiorari be granted.

Respectfully submitted,

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